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SUPREME COURT, U. S.

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FILED
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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. [illegible]

[illegible]

Appellants,

vs.

[illegible]

Appellees.

[illegible]

[illegible]

Points Relied On
by Appellants, Consolidated Canal
Land Company,
Rose Consolidated,
Attorneys for Petitioners Rose Bowers
and Louis H. Rose, Appellants.

[illegible]

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In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 689

OKLAHOMA FARM BUREAU and LEWIS H. MUNN,
Appellants,

VERSUS

HARRY R. MOSS; WILLIAM A. BURKHART, State Treasurer; MRS. IMOGENE HOLMES, State Auditor; J. D. DUNN, LAWTON LEININGER and MIKE CONNORS, composing the Oklahoma Tax Commission of the State of Oklahoma; CLEE FITZGERALD, Chairman, HERBERT F. HEWITT, Vice-Chairman, and LOUIE R. GEISER, Secretary, Members of the State Election Board of the State of Oklahoma; J. HOWARD EDMONDSON, Governor of the State of Oklahoma; and COUNCIL OF NEIGHBORHOOD DEMOCRATIC CLUBS, an unincorporated association,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

RESPONSE TO MOTION TO DISMISS

STATEMENT OF CASE

The facts pertinent to this appeal are set forth in the Jurisdictional Statement heretofore filed by appellants.

RESPONSIVE ARGUMENT

Appellees contend:

I.

That no order has been issued in this cause which is appealable, and that no injunctive relief has been granted.

In this connection, we would call attention of the Court to the following incidents which have occurred and orders which have been issued in this case, which would render the action of the lower court subject to appeal under Title 28, Sec. 1253, on the ground that the order of the lower court of August 3, 1962, is *either* an interlocutory or permanent injunction.

The interlocutory decree of June 9 provided that "this cause be continued until July 31, 1962, for the effectuation of appropriate relief and *final judgment.*"

The order entered on July 31, 1962, and filed August 3, 1962, is titled "*Decree.*" In the paragraph just preceding the concluding clause of that order, the lower court states:

> "Five months hence, when the Legislature convenes, it *must* reapportion itself in accordance with the Constitutional mandate or be judicially reapportioned."

This can certainly be construed as nothing less than an alternative writ, or a mandatory injunction.

In the body of the Decree, the court also made the following comment which fortifies our contention:

> "The Oklahoma Legislature *will be* reapportioned—on the general principle of *substantial numerical equality* in the *two Houses.*"

Corpus Juris [43 C.J.S., §1] defines an injunction as:

> "An injunction is a writ framed according to the circumstances of the case commanding an act which the Court regards as essential to justice; * * *"

Apparently, the lower court felt that the circumstances of this case justified such command as being essential to justice; and so decreed.

Among other guidelines or standards which the court *established* (see Appendix V, Jurisdictional Statement) were:

> "* * * the Court *finds* and *declares* that the seven member ceiling established in Section 10(d), Article V, Oklahoma Constitution for populous counties * * * *must be disregarded.*"

Further, (paragraph 4 of the Decree, Appendix V):

> "* * * the Oklahoma Senate *will* thus *consist* of *44 districts and 44 senators.* Under the 1960 Federal census, Oklahoma County is entitled to eight senatorial districts and senators; Tulsa County is seven senatorial districts and senators, and Comanche County, two senatorial districts and senators."

This last standard which was [illegible]oined upon the Legislature, ignores the provision of the Oklahoma Constitution which authorizes a Senate in excess of 44 Senators.

This Decree was obviously a mandatory injunction under which the Legislature was enjoined to reapportion. It is therefore an appealable order under Title 28, U.S.C., Sec. 2281 and Title 28, U.S.C., Sec. 1253.

II.

Appellees further contend:

"That appellants in effect admit the existence of invidious discrimination in Oklahoma."

These appellants on the contrary do not admit such to be the case; but on the other hand, take the position that if such discrimination does exist, the power to rectify any such condition lies with the Legislature, and if it fails to function, then the plaintiff, Mr. Moss, and the "congested areas" which he represents, have full power under the Initiative and Referendum, for adequate redress.

III.

Appellees also contend:

"An appeal at this time would cause piecemeal appeals. It will be time enough to review the action of the court when a remedy has been afforded."

It occurs to us that this is not a premature appeal; and that if appellant had waited until the March 8th reapportionment by the court in accordance with the standards and guidelines so clearly drawn by the lower court in its Decree of July 31, filed August 3, 1962, that we would have been immediately confronted with the contention that the formula was set forth and enjoined upon the Legislature on that date, and that an appeal from an implementing and simply ministerial order of March 8 would be wholly out of time. The Order of July 31 insofar as it established and enjoined upon the Legislature the only guidelines and standards which the lower court would

approve or condone, were plain, comprehensive, and final. Any subsequent order would constitute merely an application of those standards.

The Decree of July 31 may well be appropriately compared to the plans and orders relating to a military engagement. Both the strategic and the tactical battle plans have already been prepared. They have been issued to commanders who are directed to carry them out to the letter. The only order remaining to be issued from headquarters is the date and time for launching the attack. That order will not change the strategic or tactical plans one iota. Those are the basic plans, and the final order to launch the engagement is purely perfunctory. The strategic and tactical decree of July 31 is the meat of the entire case, and it would be so argued, the Court may rest assured, in the event these appellants had delayed their appeal until after March 8th.

IV.

The appellees finally contend:

> "The initiative does not afford adequate relief in Oklahoma for redress of the deprivation of the Constitutional rights of the plaintiff."

In the first place, as pointed out in the Jurisdictional Statement, in the case of *Baker* v. *Carr*, 369 U.S. 186, 82 S. Ct. 691, it was stated by JUSTICE CLARK that one of the reasons for acceptance of jurisdiction in that case, was:

> "Tennessee has no Initiative and Referendum."

One of the principal points upon which Oklahoma Farm Bureau bases its contention, and which motivates

this appeal, is that: Not only does the court ignore that Oklahoma is endowed with a republican form of government, which was acknowledged by Congress and the President at the time of Oklahoma's entry into the Union; not only does it strike down portions of the Oklahoma Constitution; and not only does it decree and direct the Legislature to apportion *both Houses* on the basis of population, but it pointedly ignores the remedy available to the plaintiff, and those similarly situated—The Initiative and the Referendum.

Appellees assert that the Initiative will not afford relief.

They refer to the recent majority of 62,000 on the Initiative referred to in Appendix 12 of Appellants' Jurisdictional Statement. We agree that the petition was struck down by virtue of the fact that it was placed on the ballot at a general election instead of a special election, where it was technically killed by the silent vote.

The purpose of that petition, however, was simply to substitute a reapportionment commission for the Legislature, for the purpose of reapportioning on the present constitutional formula. We do not agree with appellees' statement that under Article V, Section 6, of the Oklahoma Constitution, that it would require 25 per cent of the legal voters to submit another petition setting up a commission, and changing the constitutional formula.

Article V, Section 6, Oklahoma Constitution, simply provides:

> "Any *measure* rejected by the people through the powers of the initiative and referendum cannot be

again proposed by the initiative within three years thereafter by less than 25% of the legal voters."

This does not say any "similar" measure, so in order to require a number of signatures measured by 25 per cent of the legal voters, the petition would have to be substantially the same as the one appearing in Appendix 12.

Furthermore, it is a matter of common knowledge that the Oklahoma Legislature now in session has prepared a joint resolution under which it is proposed to submit to the people by referendum, an amendment to the Constitution which would at least apportion one of the Houses on the basis of voting population. This, of course, would require no petition.

Such action, however, they are restrained and enjoined from taking because the court has expressly enjoined upon the Legislature the sole responsibility of *passing legislation* apportioning *both Houses* on the *basis of population*, with no provision and no opportunity to submit such legislation by way of Constitutional referendum to the people.

It is further a matter of common knowledge that the current Legislature has now also passed legislation which will provide for 47 Senators; but which follows the Constitutional formula as to the House of Representatives, limiting Oklahoma and Tulsa Counties to seven House members each. This formula, of course, does not comply with the standards and guidelines laid down by the lower court in its Decree of July 31. Appellants therefore will undoubtedly seek to have the lower court strike down such legislation, as not being in compliance with the Decree of July 31;

and in doing so, will insist that they have no adequate remedy at law.

They have and will have deliberately ignored the remedy provided by the Oklahoma Constitution—the Initiative and Referendum. Under the provisions of Article V, Section 2, of the Oklahoma Constitution, they will only be required to have their referendum petition signed by 5 per cent of the legal voters who cast votes at the last general election, to refer such legislation to the people for final decision. It is factually evident from the assertions in plaintiff's own complaint filed in this case, that they represent ten times the voting strength of the Oklahoma rural population. It is therefore readily apparent that they are capable not only of successfully circulating a referendum petition, but carrying the election overwhelmingly, if they are dissatisfied with this, or any other, apportionment legislation which may be adopted at the current session; and at the same time and at the same election, may, under the Initiative adopt the formula they do approve.

To contend, therefore, that they have no adequate remedy at law, or that the remedy of the Initiative and Referendum is ineffective, is to be completely unrealistic and inaccurate.

CONCLUSION

It is sincerely urged, therefore, that the Court accept jurisdiction of this case so that the questions as presented in appellants' Jurisdictional Statement, and which will be more fully developed in our brief, may be given plenary treatment in order that our legislators and political leaders may know:

(1) Whether the 14th Amendment requires *both* Houses to be apportioned on the basis of *population;* and

(2) Whether or not the citizens of a state who have available to them the remedy of Initiative and Referendum are entitled to seek Federal intervention, to perform that which they can do for themselves.

Respectfully submitted,

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March, 1963.